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No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,
Petitioner,

v.

TENNESSEE SECONDARY SCHOOLS ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

JOHN C. BONIFAZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
294 Washington Street
Suite 713
Boston, MA 02108
(617) 368-9100

DAVID A. WILSON
Counsel of Record
HALE AND DORR LLP
1455 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004
(202) 942-8400

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF AMICUS CURIAE

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote, which includes equal and meaningful participation in the entire electoral process.[1] Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate in the electoral process on an equal and meaningful basis. In its work, the Institute relies on this Court's seminal White Primary Cases finding state action in any integral part of the electoral process. The Institute regards those holdings as directly relevant to the state action issue raised in this case.

SUMMARY OF ARGUMENT

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 180 F.3d 758 (6th Cir. 1999) (hereinafter *Brentwood II*), the Sixth Circuit held that the Tennessee Secondary School Athletic Association ("TSSAA") was not a state actor for purposes of 42 U.S.C. § 1983.

The Sixth Circuit found that no symbiotic relationship existed between the State of Tennessee and the TSSAA because "Tennessee explicitly *revoked* its designation of TSSAA to regulate and organize interscholastic athletics when the State Board of Education's rule to that effect was repealed in 1995." *Brentwood II*, 180 F.3d at 765-66 (emphasis in original). A 1995 amendment to the State Board of Education Rules "authorizes the public schools of the state to voluntarily maintain membership" in the TSSAA.

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[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 13 F. Supp.2d 670, 675 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999) (hereinafter, "*Brentwood I*"). This change was the "fundamental" basis for the Sixth Circuit's decision. *Brentwood II*, 180 F.3d at 766.

The Sixth Circuit's finding that no symbiotic relationship, and thus no state action, exists in this case is contrary to this Court's precedent. As this Court held in the White Primary Cases, merely changing from an explicit to a covert grant of authority cannot alter the status of the TSSAA as a state actor. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953). The State of Tennessee created the TSSAA. As even the Sixth Circuit's ruling implicitly recognizes, a symbiotic relationship existed between Tennessee and the TSSAA before the 1995 rule change. *See Brentwood II*, 180 F.3d at 762 ("Although a State Board of Education rule in effect from 1972 to 1995 'designated' TSSAA to conduct interscholastic athletics, that rule has since been repealed."). The rule change did not affect the TSSAA's structure or function within the state, its use of state resources, the efficiency benefits it confers on the state or any of the other factors demonstrating the close nexus between Tennessee and the TSSAA. The only change effected was that, where Tennessee high schools' membership in the TSSAA was once mandatory, now membership is voluntary. As is clear from the White Primary Cases, however, this change alone does not make state action private. *See Smith*, 321 U.S. 664-65 (holding voluntary association so intertwined with provision of a governmental function as to be state actor); *Terry*, 345 U.S. at 463, 469-70 (finding voluntary club, "not regulated by the state at all," to

be a state actor where club had become an "integral part" of the process of conducting elections).[2]

Under this Court's precedent, it is immaterial that Tennessee does not directly control that part of the educational process which it leaves for the TSSAA to manage. *Terry*, 345 U.S. at 469. In fact, Tennessee "has so far insinuated itself into a position of interdependence with [the TSSAA] that it must be recognized as a joint participant" in the coordination of interscholastic athletics among secondary schools in the state. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961). TSSAA coordination of interscholastic athletics has become an integral part, indeed the only effective part, of determining how the high schools in Tennessee relate to one another on the playing field. *Terry*, 345 U.S. at 469. As such, the TSSAA is a state actor for purposes of § 1983, the decision of the Sixth Circuit should be reversed and this case should be remanded for proceedings on the merits of Brentwood Academy's claims. *See id.*

ARGUMENT

I. The Sixth Circuit's Decision Is Contrary To The White Primary Cases

A. Under The White Primary Cases, A Voluntary Association May Be A State Actor

The White Primary Cases addressed efforts by the State of Texas to prevent blacks from voting in Democratic party primary elections and to subvert—through the use of nominally private actors—this Court's directives that those

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[2] *See also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) ("If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.").

efforts cease. In each instance, this Court saw through Texas' chicanery and found state action.

In the first of these cases, *Nixon v. Herndon*, the Court struck down an express Texas statute that prohibited blacks from voting in Democratic party primaries. 273 U.S. at 540-41. Writing for the Court, Justice Holmes found it "hard to imagine a more direct and obvious infringement of the Fourteenth [Amendment]." *Id.* at 541. What followed were a series of attempts by the State of Texas to subvert Justice Holmes' ruling by continuing its discriminatory practices through nominally private third party actors.

Texas' first attempt to continue its discriminatory voting policy through a third party actor was addressed in *Nixon v. Condon*, 286 U.S. 73 (1932). In *Herndon*'s wake, the Texas Legislature repealed the offending statute and replaced it with the following:

> [E]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this Sate because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.

Condon, 286 U.S. at 82. Acting under this statute, the State Executive Committee of the Democratic party ("SEC") resolved "that all white democrats who are qualified under the constitution and laws of Texas and who subscribe to the statutory pledge provided in Article 3110, Revised Civil Statutes of Texas, and none other, be allowed to participate in the primary elections to be held July 28, 1928, and August 25, 1928." *Id.*

At issue in *Condon* was whether the SEC's resolution constituted state action. *Id.* While Texas no longer had a statute on its books preventing blacks from voting in a Democratic primary, the SEC resolution had the same practical effect on voting rights—the election judges who administered Texas's ballot process continued to enforce discriminatory voting practices. Thus, the same Mr. Nixon who had been prevented by the election judges from voting in a 1924 Democratic primary by direct operation of Texas statute (*Herndon*, 273 U.S. at 539-40), was this time prevented by the election judges from voting in a 1928 Democratic primary by operation of the SEC resolution. *Condon*, 286 U.S. at 82. Mr. Nixon once again sued the "judges of election to recover damages for their refusal by reason of his race or color to permit him to cast his vote at a primary election." *Id.* at 81.

The election judges argued that while the result might have been the same, the method of achieving the result was critically different. *Id.* at 83. Where in *Herndon*, the election judges had followed a statutory mandate, in *Condon* they were merely executing a resolution of a voluntary association. *Id.* As a voluntary association, the Democratic party was free to regulate its own membership and the resolutions of its SEC were no more state action than those of a "golf club" or "Masonic lodge." *Id.* Absent state action, the election judges argued, there could be no constitutional violation. *Id.*

The *Condon* Court rejected the election judges' argument. The new statute, the Court held, granted power to prescribe the qualifications of membership and determine voting qualifications to the SEC. *Id.* at 84. If these powers of self regulation were intrinsic to a voluntary organization, the court ruled, they reside with the full State Convention of the Texas Democratic party, and not the governing SEC. *Id.* at 84-85. Since the State Convention had never authorized the SEC to limit party primaries to white voters, the SEC's resolution

was an exercise of statutory rather than inherent powers. *Id.* at 85. Thus, the SEC was acting not as a voluntary association but rather as an organ of the state itself—"the repositor[y] of official power"—and was bound to act within the confines of the Constitution. *Id.* at 88. The Court specifically reserved judgment on whether a voluntary organization exercising wholly inherent powers could nonetheless be a state actor. *Id.* at 84.

B. Voluntary Organizations Enmeshed In The Performance Of A Public Function Are State Actors

The Court answered that question in the affirmative in *Smith v. Allwright*, 321 U.S. 649 (1944). At the May 24, 1932 State Convention, the Texas Democratic party adopted the following resolution:

> Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such entitled to participate in its deliberations

Id. at 656. In the suit that inevitably arose, the judges of election again "defended on the ground that the Democratic party of Texas is a voluntary organization" and, as such, was "free to select its own membership and limit to whites participation in the party primary." *Id.* at 657.

The *Smith* Court again rejected the elections judges' voluntary organization argument. Faced with a voluntary organization exercising what *Condon* had recognized as inherent self-regulatory power, the Court examined the interrelationship of the state and the Democratic primary process. *See id.* at 662-64. The Court, citing numerous instances of entanglement, found that the state was intimately involved in the "system for the selection of party nominees for inclusion in the general election . . . ." *Id.* at 663. In turn,

the Court found, the party primary process had "become a part of the machinery for choosing officials, state and national . . . ." *Id.* at 664. The Court concluded that when membership in a party was "also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." *Id.* at 664-65. Thus, the conduct of a voluntary organization can be state action where the acts of the organization and those of the state are sufficiently intertwined. *See id.*

II. Under The Rationale Expressed In The White Primary Cases, The TSSAA Is A State Actor

As in the White Primary Cases, Tennessee cannot distance itself from an activity by statutory manipulation. Its delegation of educational functions to a "voluntary" organization does not prevent that organization from being a state actor. Viewed in the light of the White Primary Cases, the symbiotic relationship between the TSSAA and the public, state-controlled school system renders the TSSAA a state actor. The TSSAA here offers the same defense as did the Texas election judges—that it is "voluntary" and can proscribe whatever it wants. But this rationale, and the rationale of the Sixth Circuit, fails because the TSSAA is "a part of the machinery" of the public function of providing a high school education. *See Smith*, 321 U.S. at 664; *see also Terry*, 345 U.S. at 469 (finding private club a state actor where it "has become an integral part, indeed the only effective part" of the provision of a public function).

A. The Functions Of The TSSAA Are Part Of Tennessee's Core Governmental Functions

Providing elementary and secondary public education is a core governmental function of the State of Tennessee. Tennessee's constitution requires "the diffusion of the

opportunities and advantages of education throughout the different portions of the state" through the creation of a "perpetual fund" devoted to "the support and encouragement of common schools throughout the state."[3] TENN. CONST. art. XI, § 12. To this end, the Tennessee General Assembly established a "system of public education" and created a State Board of Education ("SBE") empowered to administer that system. TENN. CODE ANN. §§ 49-1-101 & 102.

Interscholastic athletics are a longstanding component of the educational experience authorized by the SBE and offered by public schools in Tennessee. *See Brentwood I*, 13 F. Supp.2d at 684 ("The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and teamwork." (citing TSSAA Const. art. 1, § 2)). By state law, participation in interscholastic athletics may be substituted for the physical education graduation requirement. *Id.* (citing TENN. BD. OF EDUC. RULE 0520-1-3-.06).

As a practical matter, the SBE or the public schools themselves must find some means to facilitate interscholastic play, including devising rules governing play, equipment, training, player and team eligibility. They could accomplish this task in one of two ways. Each school could work out rules governing competition with every other school in the state in a bilateral fashion. This solution would be cumbersome and likely would result in a patchwork of rules governing play in different regions of the state. Alternatively, the SBE could (either by itself or by proxy) create and

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[3] In this fund, the Tennessee constitution invested "all the lands and proceeds thereof, dividends, stocks, and other property of every description whatever, heretofore by law appropriated by the General Assembly of this State for the use of common schools." TENN. CONST. art. XI, § 12. As discussed below, the TSSAA now exercises control over lands held in this fund. *See infra*, p. 13.

enforce a coordinated system of statewide rules applicable to all schools.

Choosing the second alternative, the SBE tapped the TSSAA to act as its proxy in coordinating interscholastic athletics. According to its charter or constitution, the TSSAA was established "to stimulate and regulate the athletic relations of the secondary schools in Tennessee." *Brentwood I*, 13 F. Supp.2d at 673 (quoting TSSAA CONST. art. I, § 2). Since 1925, the SBE has recognized the role of TSSAA in providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee. *Id.* at 675. In 1972, the SBE enacted a rule designating the TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Id.* (quoting TENN. BD. OF EDUC. RULE 0520-1-2-.26 (current version at Rule 0530-1-2-.08)). At the same time, the SBE approved the then current rules and regulations of the TSSAA (including the Recruiting Rule at issue here) and reserved the right to review and approve the appropriateness of future changes—a power it regularly exercised. *Id.*

In creating and enforcing a coordinated system of rules for interscholastic athletics, the TSSAA is "not acting in matters of merely private concern like the directors or agents of business corporations. [It is] acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." *Condon*, 286 U.S. at 88.

B. The 1995 Amendment To The SBE Rule Did Not Alter The TSSAA's Status As A State Actor

In 1995 the SBE replaced the former Rule 0520-1-2.08, which had on three occasions been interpreted as investing

the TSSAA with the authority of the state,[4] with the following new language:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Brentwood I, 13 F. Supp. at 675 (quoting TENN. BD. OF EDUC. RULE 0520-1-2-.08) (the "1995 Amendment").

Nothing about the function or purpose of the TSSAA, the realities of its control over secondary school athletics, or the composition or leadership of the TSSAA, changed in any

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[4] Based on the factors discussed *infra* at 11-14, the TSSAA was held to be a state actor on at least three occasions prior to 1995. *See Graham v. Tennessee Secondary School Athletic Ass'n*, 1995 U.S. Dist. LEXIS 3211, 1995 WL 115890 (E.D. Tenn. Feb. 20, 1995), *appeal dismissed as moot*, 107 F.3d 870 (6th Cir. 1997); *Crocker v. Tennessee Secondary Schools Athletic Ass'n*, 735 F. Supp. 753 (M.D. Tenn.), *aff'd*, 908 F.2d 972 and 908 F.2d 973 (6th Cir. 1990); *Kelley v. Metropolitan County Bd. of Educ.*, 293 F. Supp. 485, 491 (M.D. Tenn. 1968).

Numerous other courts have found similar interscholastic athletic associations to be state actors as well. *See, e.g., Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982) ("Every court to consider the question has concluded that associations like the AIA are so intertwined with the state that their actions are considered state action." (citing cases)); *see also Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987) ("Public schools make up 85% of the IHSA's membership, and although the IHSA is a purely voluntary association, the overwhelmingly public character of the IHSA membership is sufficient to confer state action for the purpose of § 1983." (citing cases)); *In re United States ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982) (finding state action); *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 227-28 (5th Cir. 1968) (examining nexus between state and association and finding "state action in the constitutional sense").

material respect as a result of the 1995 Amendment. The only change wrought by this amendment was to make public schools' membership in the TSSAA voluntary rather than mandatory. Nevertheless, the Sixth Circuit used this change as the primary basis for reversing the district court's holding that "[t]he close identification of the TSSAA with the State's provision of education is a sufficient nexus to find state action in this case." *Compare Brentwood I*, 13 F. Supp.2d at 685, *with Brentwood II*, 180 F.3d at 765-66. This reliance on the distinction between a voluntary and a compulsory organization is contrary to this Court's holdings in the White Primary Cases.

1. *The TSSAA Is Deeply Enmeshed In The Tennessee Public Education System*

Despite the 1995 Amendment, interscholastic competition in Tennessee still mainly occurs on public grounds, in public facilities, and using public equipment. The SBE and the public schools themselves still rely upon the TSSAA to control the scheduling, participation in and control of athletic events in public schools. *Brentwood I*, 13 F. Supp.2d at 681. The TSSAA still prescribes uniform rules of play, regulates the eligibility of public school students to participate in interscholastic athletics, and acts as the only organization providing these benefits to the public schools of Tennessee. *Id.* at 683. The TSSAA remains governed by the same group of public school principals, enforces the same rules, and exerts the same real world control over secondary school athletics. It is next to impossible for a high school in Tennessee to field an interscholastic athletic team without subscribing to the rules and regulations of the TSSAA. "It is immaterial that the state does not control that part of [the educational system] which it leaves for the [TSSAA] to manage. The [TSSAA] has become an integral part, indeed the only effective part," of supervising interscholastic athletics in Tennessee. *Terry*, 345 U.S. at 469; *see also Smith*, 321 U.S. 664 (finding state action where actor has "be-

come a part of the machinery" of performing a public function).

The TSSAA is an association of public, independent and parochial secondary schools from across Tennessee. *Brentwood I*, 13 F. Supp.2d at 673. It is composed of 290 public schools and 55 independent and parochial schools. *Id.* Public high schools comprise 84% of the voting membership of the TSSAA, with independent and parochial schools making up the remaining 16%. *Id.* The rules and regulations of the TSSAA are enacted by its Legislative Council, a nine-member body made up of high school principals or assistant principals or qualified superintendents elected by popular vote in each of nine electoral districts. *Id.*

The administrative authority of the TSSAA is vested in a Board of Control, composed of nine members who are high school principals or superintendents, similarly elected by popular vote. *Id.* Throughout the relevant time period, all the voting members of the Legislative Council and the Board of Control were public high school administrators. *Id.* As a result, state employees—public high school administrators—have direct control over the development and implementation of TSSAA rules and regulations.

Tennessee devotes substantial resources to the TSSAA to help it perform its functions. The TSSAA pays employee salaries and other expenses of the association primarily out of revenues derived from games between member schools. *Id.* at 679. Employees of the TSSAA are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. *Id.* at 684 (citing TENN. CODE ANN. § 8-35-118). For a school to be a member of the TSSAA, its coach must have a Tennessee State teaching license, must be a full-time employee of the Board of Education, and must be paid entirely from funds approved by the Board of Education or the governing board of the school. *Id.* (citing TSSAA BYLAWS, art. III, § 7).

For seventy-five years, the SBE has exercised its plenary power by granting control over lands held in the common school fund to the TSSAA for use in interscholastic athletics. *See id.* at 675. The 1995 Amendment had no effect on the TSSAA's control over these public facilities. The TSSAA could exercise no power over these properties without a delegation of authority by the state. *See Condon*, 286 U.S. 88 ("The pith of the matter is simply this, that, when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the state itself, the repositories of official state power.").

Given Tennessee's extensive involvement in the operation of the TSSAA, and the TSSAA's extensive involvement in and the facilitation of the provision of public education in Tennessee, the TSSAA must be considered a state actor. *See Terry*, 345 U.S. at 474 (Frankfurter, J. concurring) ("The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to provide a government benefit).

2. *The TSSAA Has Authority To Supervise And Sanction Public Entities And Officials*

That the TSSAA acts in a governmental capacity in its oversight of interscholastic athletics is perhaps best exemplified by its ability to regulate and censure public officials. TSSAA rules require that public school principals and coaches submit certain reports to the association on a regular basis. *Brentwood I*, 13 F. Supp.2d at 684. In fact, the TSSAA Bylaws provide that principals—state-paid, state-supervised, public officials—are responsible to the association in all matters pertaining to athletic relations of their schools. *Id.* Initial responsibility for assuring compliance with all TSSAA rules and regulations is placed in the hands of the principals. *Id.* State employees, therefore,

are accountable to the TSSAA for the primary implementation and adherence to its rules.

When these coaches, schools, principals and superintendents fail to comply with the TSSAA's rules, the TSSAA has the power to conduct an extensive investigation of any violation and impose sanctions for misconduct uncovered. *Id.* at 683. The TSSAA can levy monetary fines against the public schools of Tennessee and has the power to keep schools from competing against other schools. *Id.* at 683-84. Thus, public schools—state agencies—are subject to TSSAA discipline. *Id.* TSSAA rules and regulations bind all public high schools in Tennessee that participate in interscholastic athletics.

The exercise of such extensive power over government officials is clearly not organic to a voluntary organization. *Cf. Condon*, 286 U.S. at 85 ("Power so intrenched is statutory, not inherent."). Rather, the power to compel regular reports from principals and schools, to investigate their conduct, to impose monetary fines, and to exclude them from benefits available to other public schools in the state must come "not as the delegates of the [voluntary organization], but as the delegates of the state." *Id.*

CONCLUSION

For the foregoing reasons, the Court should find that the TSSAA, in drafting and enforcing its Recruiting Rule, is a state actor for purposes of 42 U.S.C. § 1983

Respectfully submitted,

JOHN C. BONIFAZ
BRENDA WRIGHT
NATIONAL VOTING RIGHTS INSTITUTE
294 Washington Street
Suite 713
Boston, MA 02108
(617) 368-9100

DAVID A. WILSON
Counsel of Record
HALE AND DORR LLP
1455 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004
(202) 942-8400

Attorneys for Amicus Curiae